Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.3555(e) of the	)	MB Docket No. 13-236
Commission's Rules, National Television	)	
Multiple Ownership Rule	)	

OPPOSITION OF PUBLIC INTEREST COMMENTERS TO PETITION FOR RECONSIDERATION OF ION MEDIA NETWORKS AND TRINITY CHRISTIAN CENTER OF SANTA ANA, INC.

Free Press and the National Hispanic Media Coalition, together with Common Cause, Media Alliance, and United Church of Christ Office of Communication, Inc., by their attorneys, the Institute for Public Representation, (collectively, the "Public Interest Commenters") submit this opposition to the Ion Media Networks, Inc. ("Ion") and Trinity Christian Center of Santa Ana, Inc. ("Trinity," and together with Ion, "Petitioners") petition for reconsideration in the above-captioned proceeding.[1]

In the *Report and Order* that Petitioners challenge,[2] the Commission rightly concluded that after the DTV transition the UHF discount no longer has any sound technical basis. Retaining that discount would thwart the Commission's longstanding goals of competition, diversity, and localism in the broadcast TV market by allowing a single owner to control stations reaching viewers far in excess of the cap that Congress last directed the Commission to set.

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[1] Petition for Reconsideration of Ion Media Networks, Inc. and Trinity Christian Center of Santa Ana, Inc., MB Docket No. 13-236 (filed Nov. 23, 2016) ("Petition").

[2] *Amendment of Section 73.3555(e) of the Commission's Rule, National Television Multiple Ownership Rule*, Report And Order, MB Docket No. 13-236, 31 FCC Rcd 10213 (2016) ("*Report and Order*").

Petitioners nevertheless contend that: (1) the Commission only has the authority to review the UHF discount in the context of a wholesale review of the national ownership cap; and (2) the Commission's decision to forbid the transfer of grandfathered station combinations lacks sound reasoning. These arguments were aired and dismissed during the proceeding. Indeed, Commissioner Pai's extensive discussion of Petitioners' arguments in his dissent is incontrovertible evidence that these issues have been fairly heard, considered, and answered during the rulemaking proceeding.[3] This Petition fails the Commission's requirements for granting reconsideration requests, and is otherwise without merit.

I. THE PETITION IS PROCEDURALLY DEFICIENT.

As a procedural matter, the Petition must be denied. The Commission's rules governing the petitions for reconsideration of a rulemaking are clear. Petitioners identify no change in the underlying facts.[4] They present no arguments not already heard and rejected in this proceeding.[5] And no matter how strenuously they try, Petitioners fail to identify any errors or omissions the Commission needs to remedy on reconsideration.[6] The Petition merely rehashes a settled argument about the Commission's statutory authority to eliminate the UHF discount, and simply contradicts or ignores the clear reasoning the Commission articulated to justify its decisions.

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[3] *See id.*, Dissenting Statement of Commissioner Ajit Pai, 31 FCC Rcd at 10247.
[4] *See* 47 C.F.R. § 1.429(b). Underscoring that it merely restates arguments made in initial comments, the Petition takes wholesale from 2013 comments the description of Ion's "cutting edge" programming that (to hear Ion tell it) is somehow murkily connected to the continuance in perpetuity of a UHF discount. *Compare* Petition at 5-6 *with* Comments of Ion Media Networks, Inc., MB Docket No. 13-236, at i (filed Dec. 16, 2013).
[5] *See* 47 C.F.R. § 1.429(*l*)(3).
[6] *See id.* § 1.429(*l*)(1).

After discussing the likely phase-out of the UHF discount as early as its 1998 Biennial Review, the Commission returned to the scope of its authority to end this discount in the 2013 *Notice*[7] that led to the *Report and Order*. As the Commission rightly contemplated in 2013, it "has the authority to modify the national television ownership rule, including the authority to revise or eliminate the UHF discount."[8] The *Report and Order* challenged by Petitioners here directly addressed Petitioners' authority claims, and firmly rejected them – concluding that the FCC has the authority "to revise or eliminate the UHF discount" and that the 2004 Consolidated Appropriations Act ("CAA") does not alter that authority.[9] While it is understandable that Petitioners would pretend the Third Circuit's decision on Joint Sales Agreements[10] binds the Commission, the CAA expressly removed the national ownership limit from the quadrennial review.[11]

These continued complaints about authority are just one instance of many in which Petitioners pretend the *Report and Order* failed to address a question they raised in the docket. "It should go without saying that agency decisions taken without reasoned analysis are unlawful," the Petition opines.[12] Yet it also should go without saying that

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[7] *See Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Notice of Proposed Rulemaking, 28 FCC Rcd 14324, ¶ 13 (2013).
[8] *Id.*
[9] *See Report and Order* ¶¶ 19-21; *see also id.* ¶ 21 ("We find that no statute bars the Commission from revisiting the cap or the UHF discount contained therein in a rulemaking proceeding so long as such a review is conducted separately from a quadrennial review of the broadcast ownership rules pursuant to Section 202(h) of the 1996 Act.").
[10] *Prometheus Radio Project v. FCC*, 824 F.3d 33, 58 (3rd Cir. 2016).
[11] *See Report and Order* ¶ 21. As the Third Circuit has made clear, the Commission's obligation to review its rules in their entirety – no matter whether the agency decides on a particular rule to "retain, repeal, or modify [it] (whether to make [it] more or less stringent)" – is bound up with Section 202(h). *Prometheus*, 824 F.3d at 58.
[12] *See* Petition at 4.

answers do not lack reason merely because Petitioners disagree with the reasoning. The *Report and Order* devoted considerable care, time, and attention to the fact that the UHF discount long ago lost any technical justification or relevance.[13]

Elimination of this outdated rule, as the Commission rightly concluded, effectuates the 39 percent cap stipulated by Congress.[14] Far from failing to explain the impact of eliminating it, the Commission repeatedly explained that failure to do so would have the "absurd result of stretching the national audience reach cap to allow a station group to actually reach up to 78 percent of television households, dramatically raising the number of viewers that a station group can reach and thwarting the intent of the cap."[15]

Yet that is precisely what the Petitioners must contend: that when Congress said "39 percent" in the CAA, it really meant 78 percent. In that fanciful scenario, rather than merely saying 78 percent, Congress intended the Commission to reach this result by reference to a technical measure regarding UHF signal strength. And it intended reliance in perpetuity on that metric – even though the effects of the DTV transition on UHF broadcasting were well understood at the time – but failed to mention any of this in the operative statute. Petitioners' argument on this score is no more compelling on second hearing than it was in their respective initial comments.

Similarly, the *Report and Order* just as thoroughly considered and rejected Petitioners' arguments regarding the transferability of grandfathered combinations. They claim that the Commission's decision on this score was arbitrary and capricious too,

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[13] *See Report and Order* ¶¶ 25-40.
[14] *See id.* ¶ 34 ("Simply put, the UHF discount does not appropriately reflect the technical and economic reality of UHF facilities today. [It] impedes the objectives of the national audience reach cap by effectively expanding the 39 percent cap even beyond the level that Congress determined was too high when it enacted the [CAA].").
[15] *Id.*

perplexingly suggesting that the *Report and Order* "didn't even try to explain its reasoning for denying transferability."[16]

This is not an accurate characterization of the Commission's discussion of the transferability rule. The *Report and Order* spent thirteen full paragraphs on the grandfathering question, with no fewer than seven of them answering the requests made by Petitioners and other broadcasters for even more liberal carry-over of an obsolete technical rule. Responding directly to Petitioners' arguments in the record, the Commission explained the benefits of prohibiting transfer of grandfathered station groups to reflect longstanding Commission practice regarding grandfathering; move the industry towards compliance with the new rule, without the hardship of immediate divesture; yet preserve combinations "like Ion's that resulted in new broadcast networks."[17] But retaining the UHF discount in perpetuity, even after the original beneficiaries might sell the combined station group, serves no public purpose beyond entrenching incumbent broadcasters at the public's expense.

That Petitioners remain disappointed by the Commission's decision is not a sufficient basis to reconsider it, especially when the Commission directly addressed and dismissed each of their objections. The *Report and Order* is consistent with and fully justified by the record in this proceeding. For these reasons, the Petition is procedurally deficient and does not warrant consideration – much less grant – by the Commission.

[16] *See* Petition at 7.
[17] *See, e.g.*, *Report and Order* ¶ 52 & n.168 (detailing at length consistent limitations on grandfathering made available to existing broadcast licensees but not future transferees).

II. PETITIONERS' SUBSTANTIVE ARGUMENTS FOR RETAINING THE UHF DISCOUNT ARE WITHOUT MERIT.

The procedural failings outlined above should be the end of the inquiry here. The Petition fails the test for reconsideration of rulemakings set out in Section 1.429 of the rules. It fails to make any arguments properly raised in the proceeding yet unanswered by the *Report and Order*. And it fails to identify any flaws in the Commission's legal reasoning.

To the extent it is necessary to say anything further regarding the merits of the outcome, it bears repeating but not belaboring that the Commission's decision to nix the outdated UHF discount was laudable. As the Public Interest Commenters noted in multiple filings in this docket, the Commission was well within its authority to reexamine the UHF discount without a wholesale review of the national cap, and to limit the sale of grandfathered station combinations (or even to unwind existing combinations).[18] We need not rehash those arguments here. Still, it is important to note that during this proceeding, "not a single commenter contended that the original justification for the UHF discount is still valid."[19]

Commissioner Pai himself admitted as much,[20] relying in dissent on the same arguments that Petitioners now seek to revive rather than any attempted defense of the discount on its own merits. The absence of any valid technical justification for the loophole lays bare the desire of incumbent TV station owners to increase their market

[18] *See, e.g.*, Reply Comments of Free Press, Common Cause, Media Alliance, and the Office of Communication, Inc. of the United Church of Christ, MB Docket No. 13-236, (filed Jan. 13, 2014) ("Reply Comments"); Comments of Free Press, MB Docket No. 13-236 (filed Dec. 16, 2013) ("Free Press Comments").
[19] *See* Reply Comments at 1.
[20] *See Report and Order*, Dissenting Statement of Commissioner Ajit Pai, 31 FCC Rcd at 10247 ("To be sure, the technical basis for the UHF discount no longer exists.").

share at the expense of the public interest, and in contravention of Congress's last clear pronouncement that the national ownership cap should be reduced to 39 percent from the higher levels that earlier administrations attempted to set.

III. CONCLUSION

The Petition for reconsideration must be dismissed. It represents a last-ditch attempt to re-litigate issues extensively discussed over the latest three years during which the docket was open and the matter was subject to comment. The Commission, having heard and rejected these very same arguments, has no ground to reconsider the decision in this proceeding.

The Commission, in removing an antiquated technical loophole to the Congressionally mandated national ownership cap, acted just as an agency should: within its authority and expertise to effectuate its lawful mandate in a changing technical environment.

Respectfully submitted,

/s/

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